

D.P.U. 96-11

Request for Interpretation of Authority Under G.L. c. 164 with Respect to a Loan by the Littleton Electric Light Department to the Littleton Water Department.

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FOR: LITTLETON ELECTRIC LIGHT DEPARTMENT  
Petitioner

## I. INTRODUCTION

On September 21, 1995,<sup>1</sup> the Department of Public Utilities ("Department") received a Request for Advisory Ruling ("Request") pursuant to 220 C.M.R. § 2.08 from the Littleton Electric Light Department ("LELD"). The Request seeks an interpretation of LELD's authority under G.L. c. 164 to loan money to the Littleton Water Department ("LWD") for the purpose of providing partial financing for a proposed water treatment plant. The funds for the loan would come from LELD's "earned surplus" account.<sup>2</sup> The Request was docketed as D.P.U. 96-11.

## II. DESCRIPTION OF REQUEST

LELD is a municipal electric light department managed by an elected board, comprising three commissioners (DPU-1-1; DPU-1-2). While LWD has a distinctly separate board of commissioners, the same persons serve as commissioners on both LELD's and LWD's respective boards (DPU-1-1; DPU-1-2). Both departments share a general manager who has overall management responsibilities, as well as a number of office and support personnel who perform functions for both LELD and LWD (DPU-1-2). Day-to-day operations are directed by department-specific personnel (*id.*). LELD and LWD maintain separate budgets (*id.*).

LELD stated that LWD is required to construct a water treatment plant in order to comply with federal and state environmental laws, in particular the Safe Drinking Water Act (Request at 2-3). LELD explained that while the Town of Littleton ("Littleton" or "Town") approved a \$2.5

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<sup>1</sup> On December 5, 1995, LELD filed responses to six information requests issued by the Department staff.

<sup>2</sup> LELD defines "earned surplus" as net income represented by its earned return on investment as permitted by G.L. c. 164, § 58. Request at 6.

million bond issuance for construction, a recent engineering study indicated the need for additional funding (id. at 3). In order to address LWD's additional financing requirements, LELD proposes to loan a portion of its earned surplus from its allowed return to LWD to cover the shortfall between the bond issuance and the project bids (id.). LELD estimates the loan amount will be in the range of \$500,000 to \$1,000,000, to be repaid over a ten-year period at a rate equal to .25 percentage points above the rate currently earned by Littleton on the earned surplus account (id.). This account is held in the Town Treasury and any interest accrued is for the benefit of the Town, not LELD's ratepayers (id. at 3-4).

In support of its Request, LELD states that both Department and court decisions have recognized that municipal light boards have independent and significant control over appropriations from earned surplus (id. at 4). LELD notes that its budget does not require town meeting approval and is not dependent on Town appropriations (id. at 4-5). LELD contends that, while a municipal light plant may appropriate funds from its earnings for the benefit of the municipality in the form of in-lieu-of-tax payments, G.L. c. 44, § 55, provides that investment authority over those funds is vested in the Town's treasurer, with any interest income being held by the Town (Request at 6; DPU-1-6).<sup>3</sup> LELD states that if it were to make the loan to LWD through the Town, the interest income associated with the loan would be retained by the Town for municipal purposes (DPU-1-6). LELD concludes that if it were to make the loan directly, its customers would receive the benefits of the interest income (id.).

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<sup>3</sup> LELD recognizes that G.L. c. 164, § 57, provides for a limited role in the investment of depreciation funds in that municipal light plants may request that a town's treasurer invest depreciation funds on behalf of the light plant, with any interest income being credited to the depreciation fund.

LELD also argues that loans of the type proposed in the Request are contemplated by the modified Uniform System of Accounts used by the Department (Request at 5-7, citing G.L. c. 164, § 63). See 220 C.M.R. §§ 51 et seq. Specifically, LELD argues that the Department has determined that a light plant may exercise its discretion to use earned surplus for capital purposes as well as voluntary in-lieu-of-tax payments to the Town (Request at 5-7, citing Supplement to Federal Energy Regulatory Commission Uniform System of Accounts for Electric Companies for Application to Municipal Lighting Plants ("Supplement"); D.P.U. 4024-A (1983); Peabody Municipal Light Plant, D.P.U. 86-16 (1986)). LELD notes that its discretion is subject to the Department's accounting and reporting requirements, specifically, Accounts 201, 207 and 208, which allow for the possibility that funds may be appropriated from a Town Department but are subject to repayment (Request at 6).

### III. ANALYSIS AND FINDINGS

Pursuant to G.L. c. 30A, § 8, and 220 C.M.R. § 2.08, the Department has discretion to issue or to decline to issue advisory rulings as to the applicability to any person, property, or factual situation of any statute or regulation enforced or administered by the Department. Such rulings are, of course, not binding upon the Department in any subsequent proceeding. Nor may a petitioner for such an advisory ruling later plead estoppel in pais if the Department were later, in an actual adjudication based on an evidentiary record, to adopt a view of the law that differed from an earlier advisory ruling. Phipps Product Association v. Massachusetts Bay Transportation Authority, 387 Mass. 687, 693 (1982); McAndrews v. School Committee of Cambridge, 20 Mass. App. Ct. 356 (1985). In issuing an advisory opinion, the Department does not find any

facts or implicitly sanction or accept any of a petitioner's factual assertions or estimates. The petitioner is cautioned that no advisory ruling rendered here constitutes a determination by the Department with respect to the appropriateness of any particular action or scheme.

Ordinarily, the Department declines to issue advisory opinions and prefers to construe its statutes and regulations in specific factual settings. Town of Stow, D.P.U. 93-124-B at 1 (1994). Here, however, the Request is to provide some assurance that a relatively uncommon financing scheme being undertaken, at least in part, to provide for greater benefits of an investment to LELD and its ratepayers, is not, on its face, impermissible under the General Laws. This purpose strikes us as sufficient to warrant a departure from our customary reticence under G.L. c. 30A, § 8. See Massachusetts-American Water Company, D.P.U. 95-41, at 6-8 (1995).

As an initial matter, the use of a municipal light plant's depreciation fund is strictly limited by G.L. c. 164, § 57, to "renewals in excess of ordinary repairs, extensions, reconstruction, enlargements, and additions." The construction of a water treatment plant is clearly beyond the scope of capital improvements authorized by G.L. c. 164, § 57. Therefore, the Department advises LELD that the use of depreciation funds for the purpose of making a loan to LWD would be clearly contrary to statute.

In the matter of using other LELD-related sources of funds, including unappropriated earned surplus, the Department has examined both case law and statute on this subject. Our review leads us to advise that there appears to be no statutory restriction on LELD's use of its unappropriated earned surplus for the purpose of making a loan to another municipal department -- in this case, LWD. Furthermore, the Department's accounting requirements as found in the

Supplement make no restrictions on the use of unappropriated earned surplus as the source of a loan to another municipal department. In the present instance, the Department advises LELD that a loan by a municipal electric light department to another municipal department is not, on its face, inconsistent with the General Laws.

In making this ruling, the Department notes that the transfer or use of municipal light plant funds is the ultimate responsibility of the light plant's governing body and expects that LELD will demonstrate reasonable and prudent management discretion in determining the amount to be transferred. Peabody Municipal Light Plant, D.P.U. 86-16 (1986).<sup>4</sup> The Department does not make any determination as to the amount or terms of the loan contemplated by LELD, nor is this ruling intended to make any findings with respect to the organizational structure or management of LELD and LWD.

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<sup>4</sup> The correspondence of governing personnel on the LELD and the LWD boards makes it particularly important that the financial transactions between them be as transparent as possible.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Secretary of the Department serve a copy of this advisory ruling to Littleton Electric Light Department in answer to its Request of September 21, 1995.

By Order of the Department,

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John B. Howe, Chairman

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Mary Clark Webster, Commissioner

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Janet Gail Besser, Commissioner